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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-375

VERL EDWARD THAYER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California in and for the County of Orange.

RICHARD E. MAHER and
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Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

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October Term, 1971
No. .....

VERL EDWARD THAYER,

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California in and for the County of Orange.

The petitioner, Verl Edward Thayer, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Orange, entered in this proceeding on June 2, 1971.

Opinion Below.

No opinions were rendered by the Municipal Court first having jurisdiction of this matter or by the Appellate Department of the Superior Court of the State of California in and for the County of Orange before whom an appeal from the trial court judgment was taken.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California in and for

the County of Orange was entered on June 2, 1971. A timely petition for rehearing and/or in the alternative certification to the District Court of Appeal was denied on June 16, 1971. This petition for certiorari was filed within 90 days following the denial of the petition for rehearing and/or certification to the District Court of Appeal. Under the laws of the State of California, no further review of a municipal court judgment is available in the state courts. This Court's jurisdiction is involved under 28 U.S.C. 1254(1).

Questions Presented.

1. Is an old conviction, which is alleged in a new and unrelated prosecution for the sole purpose of enhancing punishment, to be evaluated for constitutionality by contemporaneous law? Does the 14th Amendment demand this?
2. Would this be retroactive application of a newly-enunciated constitutional principle?

Statement of the Case.

In March, 1971, the Petitioner was convicted of a misdemeanor criminal offense (driving a vehicle while under the influence of inebriating liquor) in a Municipal Court, County of Orange, State of California. The California Legislature has provided that there shall be a mandatory increased and augmented sentence accompanying a conviction of this particular misdemeanor upon a showing that the same defendant has suffered a prior conviction for the same offense within the past seven years. The defendant's status as a second or subsequent offender is established once the court examines the prior conviction and makes a finding that it is constitutionally valid.

At the time the Petitioner was convicted in 1971 the court found that he had suffered a prior conviction for the same offense; that the prior was constitutionally valid; and therefore that its sentence would be the increased penalty prescribed for the second or subsequent offender. This finding was made after the Petitioner had denied the prior and challenged its constitutional validity in a procedurally-proper manner.

The Constitutional issue raised by the Petitioner was decided adversely to him and this finding was affirmed by the Appellate Department of the Superior Court of the County of Orange in and for the State of California, and certification to the California District Court of Appeals was denied. Since under the laws of the State of California no further appeal is available from a final judgment of a Municipal Court, the Petitioner now seeks a Writ of Certiorari from the Supreme Court of the United States to review the matter.

The basic question raised by the Petitioner is this: In evaluating the prior conviction for constitutional validity, should the trial court have applied those contemporaneous Constitutional standards which were the law of the land in March 1971, or was it justified in assessing the prior in accordance with superseded constitutional standards which obtained at the time the prior conviction was secured?

To further define the issue, the following facts are now set forth:

1. Petitioner's prior conviction rested on a plea of guilty entered by him in March, 1969. Petitioner entered his plea without beng advised by the court that in so doing he was waiving three important federal rights—*i.e.*, the privilege against self-incrimination; the

right to confrontation; and right to trial by jury. Accordingly, he made no express or implied waiver of these rights since he was not even aware they were relinquished by pleading guilty.

2. Petitioner was sentenced by the court following his plea of guilty and paid the penalty imposed by the court.

3. A few months later, in June, 1969, the Supreme Court of the United States decided the case of *Boykin v. Alabama,* 89 S. Ct. 1709; 395 U.S. 238, and held that trial courts accepting guilty pleas have an affirmative duty to advise defendants of the federal rights involved and secure express waiver of these rights.

4. The California Supreme Court ratified the *Boykin v. Alabama* decision on November 7, 1969, when it considered *In re Tahl,* 1 Cal. 3d 122; 81 Cal. Rptr. 577; 460 P. 2d 449. The California Supreme Court held in effect that a court record silent as to advisement and waiver of the three federal rights would be presumptively invalid and that the burden of proof would be on the Prosecution to overcome this presumption of invalidity. Prior to this pronouncement, California law held that the silent record would be presumptively valid and that the defendant had the burden of proving its invalidity. The California Supreme Court also held in *In re Tahl* that *Boykin v. Alabama* would be given prospective application only. (The United States Supreme Court has not spoken to date with respect to whether *Boykin v. Alabama* is to receive retroactive or prospective application.)

5. The record of the March, 1969, conviction of Petitioner was silent with respect to the matter of advisement and waiver of the three federal rights. This

silent record was the sole evidence before the court in March, 1971, when it evaluated the prior conviction and found it constitutionally valid.

The trial court found that the prosecution met its burden of proof by presenting the silent record, even though the court acknowledged that the silent record alone would be inadequate by the current constitutional standards. The court's position was that the prior was properly evaluated by the pre-*Boykin* standards since the old conviction predated that decision. The court said that the new standards should be applied only to guilty pleas entered after June 2, 1969, when the *Boykin* decision was handed down by the United States Supreme Court. The court felt that this was the proper interpretation of the holding of *In re Tahl,* 1 Cal. 3d 122; 81 Cal. Rptr. 577; 460 P. 2d 449, and its ruling of prospectivity.

Petitioner, in opposition to the court's position, urged that a prior conviction challenged for constitutionality in an entirely new and unrelated trial taking place after the new constitutional standards were established by the highest court of the land should be evaluated by the new standards and not those superseded ones which have been judicially ruled inadequate.

Petitioner acknowledged that the holding of prospectivity would prevent any attack on the prior conviction which sought to set aside or avoid any punishment inherent in that conviction. Thus, for example, a habeas petition or a motion for new trial would be properly denied. However, the law is clear that in instances where a defendant suffers a sentence or penalty of increased dimension in a new trial by virtue of prior offenses, it is only the second or subsequent offense which

is being punished. To hold otherwise would violate the double jeopardy provisions of both state and federal constitutions. The second trial is in no sense an adjunct or continuation of the first one. It is an entirely new and separate proceeding. Therefore, petitioner submits that if prior convictions are alleged they merely become part of the pleadings before the court in trying the new matter and should be ruled on in the light of whatever laws and constitutional standards exist at the time of the new trial.

The crux of Petitioner's contention is this: He was convicted once in a constitutionally-questionable manner. Sentence was passed following that conviction and he paid his debt to society in full. Now the court relies on that constitutionally-infirm prior conviction to adjudge him a second offender and extract a higher penalty following conviction in an entirely new trial. The end result is that the Petitioner must suffer twice for having entered a guilty plea in March, 1969, without a full understanding of the Constitutional rights he relinquished in so pleading.

The Petitioner has found no precise authority for his position that prior convictions alleged in new trials to enhance punishment are entitled to full constitutional safeguards as they exist on the day the new trial is heard. However, he feels that the case of *Burgett v. State of Texas,* 88 S. Ct. 258 (1967); 389 U.S. 109, offers strong support with respect to the policies and principles involved.

In *Burgett, supra,* the defendant was convicted in Texas of assault with intent to commit murder. On appeal the U.S. Supreme Court reversed the conviction and in its opinion commented on the use of constitutionally-infirm priors to enhance punishment for other

offenses. The court said in substance that when the defect in the prior conviction involves a "specific federal right," the judiciary must be particularly alert to guarantee that the defendant does not suffer anew from his original constitutional deprivation.

Petitioner believes that *Burgett* establishes the general principle that it is fundamentally unfair for a defendant to suffer additional punishment predicated only on a prior conviction which cannot withstand the scrutiny of contemporaneous constitutional standards.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Raises Significant and Unanswered Questions With Respect to the Proper Interpretation of a High Court Ruling That a New Constitutional Standard Shall Be Given Prospective Effect Only.

The modern tendency of the United States Supreme Court and state Supreme Courts to establish new constitutional guidelines and afford them prospective effect only has created a judicial no-man's land for the prior offender. The practice of providing increased penalties for second or subsequent offenders, or classifying them as habitual criminals, is common throughout the United States. The issue brought in focus by the Petitioner's second conviction for a misdemeanor offense in a Municipal Court in the State of California arises daily in state and federal courts at all levels. A prior conviction was secured in a manner which is subsequently held to be constitutionally inadequate. New standards are established to cure the constitutional deficiency but are denied retroactive application because of pragmatic considerations. Then, at a point in time after the new standard has been adopted as the law of the land, the defendant is again before a court in a new and unrelated matter, and the prior conviction which admittedly would not satisfy contemporaneous constitutional standards is used affirmatively by the prosecution and the court to classify the defendant as a second or subsequent offender and impose increased sanctions.

The trial court refuses to give the defendant the benefit of the new constitutional standards in evaluating the validity of the prior conviction on the grounds that to do so would violate the high court ruling

that the particular new standard in issue should be applied prospectively only.

The end result is that the court judges the prior conviction by standards which have been judicially ruled inadequate and which have been superseded by new laws or procedures promulgated to remedy the constitutional deficiency of the old law. In effect, the defendant is denied the full benefit of the law as it exis's on the day he is before the court in the trial of the new matter. He is told by the court that in his case the old law is not really dead but merely dormant and because it was applied to him in the past, he is denied the benefit of a more favorable standard subsequently adopted.

Petitioner is convinced that this patently unjust result is neither contemplated nor intended by the Supreme Court of the United States when it limits a new holding to prospective application. He seeks by this Writ to have a definitive statement from high court as to what effect a ruling of prospectivity should have on prior convictions offered at a new and unrelated trial solely for purposes of augmenting and increasing punishment.

2. The Decision Below Conflicts With the Principles Enunciated by the U.S. Supreme Court in Burgett v. Texas, 88 S. Ct. 258 (1967).

To the extent there is any existing authority on this issue of the effect of a holding of prospectivity on priors alleged for punishment purposes at new trials, it is found in the case of *Burgett v. State of Texas*, 88 S. Ct. 258 (1967). Petitioner urges that the principles encunciated by the court in the *Burgett* opinion should be applied to the issues raised herein.

The *Burgett* opinion holds in essence that two wrongs do not make a right; that justice does not require a defendant to suffer twice from a contitutionally-questionable judicial proceeding; and that a defendant is entitled to the full benefit of whatever constitutional protections exist on any given day he may be before a court.

The trial and appellate courts denied the applicability of the Burgett principles to Petitioner. They steadfastly hold to their opinion that a ruling of prospectivity requires that all priors be evaluated for constitutionality by the standards which existed on the day the prior conviction was secured. They refuse to recognize that the prior offender who will suffer anew by reason of allegation of the prior is in a special category and requires special consideration from the law.

The apparent narrowness of the issue is deceptive; a practical matter the defendant found to be a habitual criminal or subsequent offender may be required to spend many additional months or years in custody. become ineligible for parole, and be required to pay heavily increased fines.

3. The Decision Below Is Offensive to the Due Process and Equal Protection Clauses of the United States Constitution.

Petitioner submits that the court's refusal to evaluate the prior conviction by contemporaneous constitutional standards offends both the due process and equal protection clauses of the federal constitution. The court in effect advises him that although the old standard applied at the time of the first conviction will not be constitutionally acceptable for others who may be brought to trial on the same day, it will be resurrected by the court hearing his new matter simply because he suffered under it on a previous occasion.

It is submitted that Petitioner, and those in similar circumstances, are entitled above all others to careful scrutiny of priors for constitutional infirmities. Petitioner has paid a penalty in the past which might not be exacted from him today. Surely justice demands that no future punishment emanate from the old conviction unless it can be found constitutionally sound when tested by the law in effect at the time sentence is imposed in the new proceeding.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Respectfully submitted,

RICHARD E. MAHER and
JAMES K. BATCHELOR,
Attorneys for Petitioner.

APPENDIX.

Minute Order.

In the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Court convened at 10:00 A.M. June 16, 1971, present Hon. Herlands, J. Hon. Murray, J. Hon. Thompson, Presiding, Judge; H. J. Gallagher, Deputy Clerk; and the following proceedings were had:

AP-1029 People vs. Thayer, Verl Edward.

Petition for re-hearing and/or in the Alternative, Certification to the District Court of Appeal.

The herein above petition having been received and considered, the Court now rules: Petitions and each are hereby denied.

ENT: 6-16-71.

Notice of Filing Judgment.

Superior Court of the State of California, for the County of Orange.

The People of the State of California, Plaintiff, vs. Verl Edward Thayer, Defendant. No. AP-1029, Municipal Court No. 33188.

To: Cecil Hicks, District Attorney, P. O. Box 808, Santa Ana, Calif.

Kurilich, Slack, Ballard, Batchelor, Maher & Ricks, Attorneys at Law, Suite 400 Leatherby Bldg., 1400 No. Harbor Blvd., Fullerton, Calif.

Hon. James K. Turner, Judge of Municipal Court, West Orange County Jud. Dist., 8144 Westminster Avenue, Westminster, Calif.

You and each of you will please take notice that in the above entitled matter Judgment was filed in this office on the 2nd day of June, 1971, a copy of which is attached hereto and made a part of this notice.

Dated: June 2, 1971.

WILLIAM E. ST. JOHN, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Orange.

H. J. Gallagher
H. J. Gallagher, Deputy
Appellate Division

(Affidavit of Service Omitted in Printing.)

On Appeal From the Municipal Court of the West Orange County Judicial District.

Entered in the Register of Actions on June 2, 1971 W. E. St John, County Clerk, by H. J. Gallagher, Deputy.

Appellate Department, Superior Court of the State of California, County of Orange.

The People of the State of California, Plaintiff and Respondent vs. Verl Edward Thayer, Defendant and Appellant No. AP-1029.

Filed: June 2, 1971.

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It Is Ordered and Adjudged that the order denying defendant's motion to vacate and set aside prior conviction made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed and the cause remanded to the Municipal Court for further proceedings.

Dated this 2nd day of June, 1971.

HERLANDS
Herlands Judge

MURRAY
Murray Judge

THOMPSON
Thompson Presiding Judge

Notice of Filing Record on Appeal and Notice of Hearing.

In the Appellate Department of the Superior Court, County of Orange, State of California.

The People of the State of California Plaintiff, vs. Verl Edward Thayer, Defendant. No. AP-1029, Municipal Court No. TC 33188.

To: Kurilich, Slack, Ballard, Batchelor, Maher & Ricks, Attorneys at Law, Suite 400 Leatherby Bldg., 1400 No. Harbor Blvd., Fullerton, California.

Cecil Hicks, District Attorney, P. O. Box 808, Santa Ana, Calif.

The record on appeal in the above entitled case was this day filed in this office. Hearing is set for May 27, 1971 at 10:00 A.M. in Department No. 16.

Appellant's opening brief shall be filed on or before April 29, 1971.

Respondent's brief shall be filed within ten (10) days after the filing of Appellant's opening brief.

Appellant's reply brief may be filed within five (5) days after the filing of Respondent's brief.

AN ORIGINAL AND FOUR (4) COPIES OF EACH BRIEF SHALL BE FILED.

A fee of $-0- is required for the filing of a respondent's brief in civil matters. No fee is required for filing briefs in criminal matters. The original of each brief

shall show proof of service on each adverse party who has appeared separately.

DATE April 14, 1971.

W. E. ST JOHN, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Orange.

L. A. Brizzolara
L. A. Brizzolara Deputy
Appellate Division

PLEASE NOTE: Rule 105(e), California Rules of Court which contains the following: "The Clerk *shall not* file any brief which does not conform to these rules or which is tendered to him for filing after the time fixed by these rules or by any order extending or fixing the time therefor, unless by order of the presiding judge."

(Affidavit of Services Omitted in Printing.)

IN THE MUNICIPAL COURT OF WEST ORANGE COUNTY JUDICIAL DISTRICT
COUNTY OF ORANGE, STATE OF CALIFORNIA

MINUTE SHEET

DEFENDANT Verl Edward Thayer CASE NO. TC 33188

VIOLATION OF SECTION(S) 23102 A CVC

AUG 17 1970

Defendant in court ~~with(out)~~ (by) counsel Wm. S. Anagnostou
Defendant states his true name to be as charged
Defendant advised of rights as per adopted statement.
Defendant advised by the court that he is entitled to a public trial by court or by jury within 30 days of his arraignment if in custody and within 45 days in all other cases; to the aid of the court in producing witnesses in his behalf; to be confronted with the witnesses against him; to refuse to become a witness against himself; to be admitted to reasonable bail; to the aid of counsel in every stage of the proceedings. Defendant advised of his right to court appointed counsel if financially unable to retain counsel. The court inquired and determined that the defendant was ___able to understand his rights. The court explained the nature of the charge, the available pleas and possible punishment.

[] The court asked defendant if he wanted an attorney. Defendant sated that he did not; the court determined that defendant knowingly, understandingly, and intelligently waived his right to counsel.
[] Court appointed counsel _____
[] Defendant advised the court he would retain his own counsel.
[✓] Defendant enters his plea of not guilty to the offense(s) as charged in the complaint.
[] Defendant waived his right to a jury trial. The court determined that the defendant knowingly, understandingly, and intelligently waived his right to a jury trial.
[] The court explained the defendant's right to a speedy trial. Defendant waived that right. The court determined that defendant knowingly, understandingly, and intelligently waived that right.
[✓] Case set for ~~court~~/jury trial on 10-8, 1970, at 7:30 A.M.
[] Case continued to _____, 1970, at _____.M. for arraignment and plea.
[] Case continued to _____, 1970, at _____.M. for pronouncing judgment.
[] Bail set at $_____.
[✓] Bail continued.
[] Defendant released on his own recognizance on written promise to appear.
[] Defendant waives statutory time and demands immediate sentence.

W. W. To be filed

JELIA BAKER

OCT - 8 1970

Defendant in court with.....counsel W. Anagnostou
People represented by District Attorney.....
.....Reporter, ...Interpreter.

DEFENDANT WAIVES STATUTORY TIME AND REQUESTS CONTINUANCE FOR Jury

CASE CONTINUED TO 11-19 1970, 8:45 A.M.P.M.

JAMES K. TURNER

NOV 19 1970

KENNETH M. SMITH

Defendant in court with_____counsel W. Anagnostou
People represented by District Attorney C. Sinclair
_____Reporter, _____Interpreter.

DEFENDANT WAIVES STATUTORY TIME AND REQUESTS CONTINUANCE FOR Jury

CASE CONTINUED TO 1-5 1971 8:30 A.M.P.M.

BEST AVAILABLE COPY

JAN -5 1971

Defendant in court with.....counsel Richard Maher
People represented by District Attorney.....
.....Reporter, ... Interpreter.

Motion by dft to have prior conviction of 3-18-69 in West Orange Co. Muni Court declared constitutionally invalid in that the record does not show a fair manner, manner of confrontation, or a manner of self incrimination

Certified copy of minutes of case # 21111, West Orange Co Muni Court filed.

Declaration in support motion to declare prior conviction invalid filed

MOTION DENIED.

Defendant demands, waives Jury.; manner confrontation of witnesses and privilege of self-incrimination

The court stated to the defendant that although he has not read the report, through discussion with counsel in Chambers, the defendant would probably be found guilty

PEOPLE, DEFENDANT AND COUNSEL STIPULATE CAUSE MAY BE SUBMITTED ON ARREST REPORT.

Police report H.B.P.D No # 70-11455

Ordered filed as People's -- Plaintiff's Exhibit No. 1

- Stipulation that blood/alcohol level was .27%

Defendant waives statutory time.

CASE CONTINUED TO 2-19 1971 9 A.M. P.M. for ruling

B/C

JAMES K. TURNER

FEB 19 1971

Defendant in court with.....counsel Richard Maher
People represented by District Attorney.....
.....Reporter, ... Interpreter.

DEFENDANT WAIVES STATUTORY TIME AND REQUESTS CONTINUANCE FOR ruling

CASE CONTINUED TO 3-19 1971 9 A.M. P.M.

B/C and Defendant released on his own recognizance.

JAMES K. TURNER

(see Pg II)

BEST AVAILABLE COPY

BEST AVAILABLE COPY

IN THE MUNICIPAL COURT OF WEST ORANGE COUNTY JUDICIAL DISTRICT
COUNTY OF ORANGE, STATE OF CALIFORNIA

MINUTE SHEET

CASE NUMBER TC 33188

DEFENDANT Verl Edward Thayer

VIOLATION OF SECTION(S) 23102-a

Court Convened at ____.M.; present Hon. _____, Judge

_____ Court Clerk _____ Division

MAR 19 1971

Defendant in court with Ty counsel Richard Maher
People represented by District Attorney David Kirchner
_____ Reporter, _____ Interpreter.

This case having been continued for ruling People move to allege prior conviction of 23102-a VC. in the West Orange County Judicial District Municipal Court on March 18, 1969

MOTION GRANTED.

Defendant waives time for arraignment and denies prior on grounds that it is untrue and further defendant moves the prior be found constitutionally invalid per Boykin vs Alabama.

Certified copy of minutes of prior

Ordered filed as People's - - Plaintiff's Exhibit No. 2

Court finds prior to be constitutionally valid and overrules defendants objection thereto and denies defendants motion

PEOPLE REST
DEFENDANT RESTS

Court finds defendant ——— Guilty as charged in the complaint.
as to violation of Section 23102-a V.C

Court finds allegation of prior to be true

DEFENDANT WAIVES STATUTORY TIME
FOR PRONOUNCING OF JUDGMENT.

Defendant arraigned for pronouncement of judgment and states in response to the courts inquiry that there is a legal reason why judgment should not now be pronounced, namely that public records of the alleged prior before the court and the Department of Motor Vehicles tend to increase the seriousness of the crime and enhance punishment

The court overrules the defendants' objection and finds that there is no legal reason why judgment should not now be pronounced.

NO LEGAL CAUSE WHY JUDGMENT SHOULD NOT BE PRONOUNCED, NOW THEREFORE IT IS ORDERED THAT [illegible] BE SUSPENDED SENTENCE _____ SUSPENDED [illegible] PROBATION, CONDITIONS AS FOLLOWS:

1. NO VIOLATION OF law
2. Fine of 250 tpa or 30 days O.C.J
3. Serve 5 days O.C.J.
4. _____

Execution of sentence stayed pending outcome of appeal

Abstract of conviction not to be sent to Department of Motor Vehicles until appeal is determined

JAMES K. TURNER

BEST AVAILABLE COPY

IN THE MUNICIPAL COURT OF WEST ORANGE COUNTY JUDICIAL DISTRICT
COUNTY OF ORANGE, STATE OF CALIFORNIA

MINUTE SHEET

WEST ORANGE COUNTY JUDICIAL DISTRICT MUNICIPAL COURT COUNTY OF ORANGE STATE OF CALIFORNIA

Case Number (Traffic Complaint) TC 21111

DEFENDANT Verl Edward Thayer

VIOLATION OF SECTION(S) 23102a

NOV 1 . 1968

Court Convened at 9A M.; Present Hon. DAVID AARON Judge

Gloria M. White Court Clerk 6 Division

DEFENDANT IN COURT WITH ____ COUNSEL Stan Gould
PEOPLE REPRESENTED BY DEPUTY DISTRICT ATTORNEY ____
DEFENDANT STATED HIS TRUE NAME TO BE as above
DEFENDANT AND COUNSEL WAIVE FURTHER ARRAIGNMENT AND READING OF COMPLAINT. TO COMPLAINT DEFENDANT ENTERS PLEA OF NOT GUILTY
AS TO VIOLATION OF SECTION 23102a 01C
DEFENDANT WAIVES STATUTORY TIME AND DEMANDS WAIVES JURY TRIAL
CASE SET FOR JURY COURT TRIAL FOR 12-17 1968 8:30 A.M. P.M.

I HEREBY CERTIFY the foregoing to be a full, true and correct copy in the within named cause.
ATTEST my hand this 16th day of October, 1968
RICHARD J. WACK, Clerk
By Marjorie Norman DEPUTY CLERK

BAIL CONTINUED

DEC 17 1968 COURT CONVENED AT 9:45 M.; PRESENT HON. HARMON G. SCOVILLE, JUDGE
DOUGLAS HODGE, COURT CLERK ____ DIVISION

Defendant in court with ____ counsel Gordon Dale for Gould
People represented by District Attorney ____
____ Reporter, ____ Interpreter.
DEFENDANT WAIVES STATUTORY TIME AND REQUESTS CONTINUANCE FOR Jury
CASE CONTINUED TO 2-4 1969 8:30 A.M. P.M.

BAIL CONTINUED

FEB - 4 1969 COURT CONVENED AT 8:30 M.; PRESENT HON. WALTER W. CHARAMZA, JUDGE
Gloria M. White COURT CLERK 3 DIVISION

Defendant in court with ____ counsel Gordon Dale for Gould
People represented by District Attorney Wm. Wright
____ Reporter, ____ Interpreter.
DEFENDANT WAIVES STATUTORY TIME AND REQUESTS CONTINUANCE FOR Jury
CASE SET FOR TRIAL FOR 3-18 1969 8:30 A.M. P.M.
BAIL CONTINUED
DEFENDANT ORDERED TO BE PERSONALLY PRESENT

MAR 18 1969 COURT CONVENED AT 8:30 A M.; PRESENT HON. WALTER W. CHARAMZA, JUDGE
Gloria M. White COURT CLERK 3 DIVISION
DEFENDANT IN COURT WITH ____ COUNSEL Stan Gould
PEOPLE REPRESENTED BY DEPUTY DISTRICT ATTORNEY D. Bryant
PLEA OF NOT GUILTY WITHDRAWN AND PLEA OF Guilty
ENTERED AS TO VIOLATION OF SECTION 23102 (a) VC
DEFENDANT WAIVES STATUTORY TIME FOR PRONOUNCING OF JUDGMENT.
FINE OF $250.00 + P.A. OR 1 DAYS for each count or all pertaining thereto
AS TO VIOLATION OF SECTION 23102 (a) VC
COURT RECOMMENDS NO SUSPENSION OF DRIVING PRIVILEGES
JAIL COMMUTED
STAY OF EXECUTION TO 3-18 1969 12 noon
FOR Federal Trial Ct.

BEST AVAILABLE

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-375

VERY EDWARD THAYER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

CECIL HICKS,
District Attorney,
County of Orange, State of California,
Post Office Box 808,
Santa Ana, Calif. 92702,

MICHAEL R. CAPIZZI,
Assistant District Attorney,
By ORETTA D. SHARP,
Deputy District Attorney,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-375

VERY EDWARD THAYER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Answer to Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Orange.

Statement of Facts.

The minutes of the Municipal Court of West Orange County Judicial District are attached to the Petition, and show that Complaint No. 33188 was filed in that court on August 8, 1970, charging Petitioner with Violation of California Vehicle Code Section 23102(a) in that on that same day Petitioner had been driving a vehicle upon a highway while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug. The Petitioner had suffered a prior conviction for the same offense and the prior conviction is duly alleged in that Complaint. The California Vehicle Code provides a higher penalty for those who have suffered such a prior conviction.

After several continuances requested by Petitioner and his attorney, Petitioner, prior to trial moved the Court to set aside the prior conviction. The *grounds*

for the motion are reflected in the minutes of the Municipal Court (page 2 of Attachments to the Petition) wherein it is stated:

> Motion by defendant to have prior conviction of 3-18-69 in West Orange County Municipal Court declared constitutionally invalid in that the record does not show a jury waiver, waiver of confrontation, or a waiver of self-incrimination.

Those same minutes reflect that on March 19th:

> "Defendant . . . denies prior on ground that it is untrue and further defendant moves the prior be found constitutionally invalid per *Boykin v. Alabama.*"

The settled statement of facts on appeal which with the Minutes of the Court relating to the offense of August 8, 1970, and with those relating to the taking of the prior plea constitute the totality of the record on appeal, states:

> "Counsel for defendant moved the Court to declare the 1969 prior conviction unconstitutional as a matter of law."

The Minutes of the West Orange County Municipal Court relating to the prior conviction are reported at pages six and seven of the Attachments to the Petition. They show that a complaint alleging Violation of section 23102a of the California Vehicle Code was filed against Petitioner in November, 1968. On November 16th Petitioner appeared in court *with private counsel,* plead not guilty to the charge, and demanded a jury trial, which, Petitioner having duly waived statutory time, was set for December 17, 1968.

On December 17, 1968, Petitioner *appeared in Court with counsel,* again waived statutory time, requested

and obtained a continuance to the *jury trial* date to February 4, 1969.

On February 4, 1969, Petitioner appeared in Court *with his counsel,* once more waived statutory time, and demanded and obtained a continuance of his *jury trial* to March 18, 1969.

On March 18, 1960, Petitioner, *once more in court with his counsel,* withdrew his plea of not guilty and entered his plea of guilty.

Questions Presented.

1. Whether the Petitioner was denied any of his constitutional rights by the procedure which in determining the validity of a prior conviction placed on him the burden of alleging and making a *prima facie* showing that at the time he changed his plea from not guilty to guilty he had not *in fact* been advised of his constitutional rights.
2. Whether an opinion of the United States Supreme Court which merely has the effect of changing the burden of proof without altering the intrinsic constitutional rights of a defendant should be given retroactive application in *any* instance when to do so would seriously and overwhelmingly burden the administration of justice by requiring a reconsideration of about one-third of all cases heard and adjudicated since *Boykin v. Alabama.*
3. Whether the law of the State of California controlling the adjudication of the validity of prior convictions violates any provision of the United States Constitution.

ARGUMENT.

I.

The Procedure for Determining the Validity of a Guilty Plea Set Forth by the California Supreme Court Requires a Defendant to Allege Constitutional Deprivation of Rights.

Petitioner, at page 3 of his Petition, makes the following contention:

> "Petitioner's prior conviction rested on a plea of guilty entered by him in March, 1969. Petitioner entered his plea without beng [sic] advised by the court that in so doing he was waiving three important federal rights—i.e., the privilege against self-incrimination; the right to confrontation; and right to trial by jury. Accordingly, he made no express or implied waiver of these rights since he was not even aware they were relinquished by pleading guilty."

Ab Initio it must be stated that *had* Petitioner made such contention the procedure set forth by the California Supreme Court for determining the validity of a guilty plea would have required the court to make a finding of fact. The Supreme Court of the State of California in *People v. Coffey*, 67 Cal. 2d 204, 217 has stated:

> Although the facts of this case do not call upon us to delineate the nature of the contemplated hearing, we do so for the guidance of courts and counsel who will be called upon to deal with similar matters in the future: *First*, when a defendant, whether by motion to strike the prior conviction or convictions on constitutional grounds, or by denial of such prior conviction or convic-

> tions on constitutional grounds at the time of entering his plea to the same, raises the issue for determination, the court shall, prior to trial, hold a hearing outside the presence of the jury in order to determine the constitutional validity of the charged prior or priors in issue. *Second*, in the course of such hearing the prosecutor shall first have the burden of producing evidence of the prior conviction sufficient to justify a finding that defendant "has suffered such previous conviction." (Pen. Code, §1025.) *Third*, when this prima facie showing has been made, the defendant shall thereupon have the burden of producing evidence that his constitutional right to counsel was infringed in the prior proceeding at issue. *Fourth*, if defendant bears this burden, the prosecution shall have the right to produce evidence in rebuttal. *Fifth*, the court shall make a finding on the basis of the evidence thus produced and shall strike from the accusatory pleading any prior conviction found to be constitutionally invalid.

To raise the issue of constitutionality, however, a defendant must set forth an allegation that he was in fact deprived of his constitutional rights. On this point *People v. Coffey*, 67 Cal.2d 204, 215 states:

> We emphasize, however, that the issue must be raised by means of allegations which, if true, would render the prior conviction devoid of constitutional support. "One seeking to challenge prior convictions charged against him may do so only through a clear allegation to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented*."

(Original italics.) (*People v. Merriam* (1967) 66 Cal.2d 390, 397 [58 Cal.Rptr. 1, 426 P.2d 161].)

It should be noted that in *Coffey* the Supreme Court found the defendant's allegations to be sufficient to raise the issue.

The same rule was reiterated in *People v. Williams*, 67 Cal.2d 226, 231-232 where the court stated:

> As noted above, defendant at trial admitted the prior conviction charged against him. It is now contended that the cause must be remanded because the trial court, at the time of such admission, failed to determine on its own motion whether, in the proceedings leading to that prior conviction, defendant's constitutional right to the assistance of counsel was duly preserved. (See *In re Woods* (1966) 64 Cal.2d 3 [48 Cal.Rptr. 689, 409 P.2d 913].) We have recently held, however, that "the burden of initiating inquiry into the constitutional basis of a prior conviction lies with him who would challenge its validity rather than with the trial court," and that a defendant's failure to assume that burden at the trial court level forecloses consideration of the matter on direct appeal. (*People v. Merriam* (1967) 66 Cal.2d 390, 398 [58 Cal.Rptr. 1, 426 P.2d 161]; *cf. People v. Coffey* (1967) *ante*, p. 204 [60 Cal. Rptr. 457, 430 P.2d 15].) The trial record herein discloses no effort by defendant to properly raise the constitutional question, and it therefore lies without the scope of our present review.

In *People v. Merriam*, 66 Cal.2d 390, a case almost identical with the case at hand, the California

Supreme Court sets forth the rules and finds that defendant who had failed to allege *any* gound for invalidity except "a silent record" had not sustained the burden of proof. The court there states:

> Further, and even if the limited scope of direct appeal did not preclude our present consideration of defendant's contention, it is clear that defendant, through unsworn statements of counsel to the effect that "the record is silent" on the issue of representation by counsel, has not made the kind of allegation necessary to constitutional inquiry under our *Woods* and *Luce* decisions. One seeking to challenge prior convictions charged against him may do so only through a clear allegation to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented.*

The court at note 7 points out that:

> It is significant that counsel for defendant does not identify the "record" upon whose "silence" he relies. If he has reference to the transcript, minutes, and judgment of the proceedings wherein defendant admitted the prior conviction, it is clear that the silence of this record is the very factor which precludes our consideration on direct appeal of the issue sought to be raised. The failure of the record *of the proceedings leading to the prior conviction itself* to establish representation by, or an intelligent waiver of, counsel is a pertinent factor supportive of allegations of constitutional defect, but such failure is of no relevance absent allegations properly made.

The rationale behind the rule of the California Supreme Court is set forth in *In re Woods*, 64 Cal.2d 3, 9 where the court points out:

> It is clear, however, that the matter of waiver of constitutional rights is to be determined on the *facts* of each particular case (*In re Johnson, supra*, 62 Cal.2d 325, 335), and that an inflexible exclusive adherence to the strict record is neither constitutionally required nor in the best interests of effective judicial administration. This consideration is the more apparent when, as here, we examine convictions entered long before the right sought to be enforced was judicially articulated. *Though we must insist that past convictions stand the test of current constitutional principles relative to the right to counsel, we cannot reasonably insist that the record of those convictions reflect impossible prescience.* (Emphasis added.)

In support of its position the California Supreme Court argued as follows:

> In *Rice v. Olson*, 324 U.S. 786 [65 S.Ct. 989, 89 L.Ed. 1367], it was held that, although the Fourteenth Amendment would not permit a presumption of waiver from the appearance of the accused without counsel and the silence of the record as to a request, a fact issue as to whether an effective waiver had occurred was raised by his plea of guilty. There petitioner's denial of waiver by word or act was controverted by the state's allegation of waiver, and a hearing was ordered. *Carnley v. Cochran, supra*, 369 U.S. 506, explicitly approved the *Rice* rationale, but held that a hearing was not required in that case because

> the state did no allege that there had been an affirmative waiver. (*Carnley v. Cochran, supra,* 369 U.S. 506, 516.) In the course of that decision the court uttered its well-known language to the effect that waiver will not be presumed from a silent record (*Carnley v. Cochran, supra,* 369 U.S. 506, 516), but it clearly did not hold that non-waiver will be presumed from a silent record. Thus, the clear position of the highest court is that the determination of waiver is not to be based wholly on the strict record of proceedings below, though a party who does not raise the fact issue by proper allegations may be bound by that record.

Again it should be noted that in that case the defendant alleged that *he had not* waived his rights and the court found that issue had properly been joined.

The California Appellate Court have followed the procedure set forth by the California Supreme Court and have been keenly alert to defend the rights of a defendant. Thus in *People v. Newton,* 8 Cal.App.3d 359, 386, for example, after setting forth the rule that:

> Where a prior conviction is constitutionally invalid because the accused was deprived of his Sixth Amendment right to counsel or did not effectively waive it, utilization of the conviction in a subsequent prosecution to support his guilt, enhance his punishment, or impeach his testimonial credibility, is constitutional error. (*Burgett v. Texas* (1967) 389 U.S. 109, 114-116 [19 L.Ed.2d 319, 324-326, 88 S.Ct. 258]; *People v. Coffey* (1967) 67 Cal.2d 204, 218-219 [60 Cal. Rptr. 457, 430 P.2d 15].) When he raises the

> issue in the subsequent prosecution by moving to strike the prior or by denying it (upon constitutional grounds in either instance), the trial court must hold a hearing outside the presence of the jury and make a relevant finding based upon evidence there presented. (*People v. Coffey, supra,* at pp. 217-218.) The required hearing must be conducted even if the issue arises during the trial, so long as the objection is asserted before the case is submitted to the jury. (*People v. Curtis* (1969) 70 Cal.2d 347, 359-361 [74 Cal.Rptr. 713, 450 P.2d 33].)

That Court concluded:

> Recent decisions establish that such inquiry is required before a waiver of counsel can be accepted by a trial court. (E.g., *People v. Carter* (1967) 66 Cal.2d 666, 672 [58 Cal.Rptr. 614, 427 P.2d 214]; *People v. Armstrong* (1969) 274 Cal.App.2d 297, 303 [79 Cal.Rptr. 223].) While defendant's motion and its supporting declaration were drafted inartfully and in obvious haste, they presented a reasonably "clear allegation" by defendant "to the effect that, in the proceedings leading to the prior conviction under attack, he *neither was represented by counsel nor waived the right to be so represented.*" (Original italics.) (*People v. Coffey, supra,* 67 Cal.2d 204 at p.215 [quoting *People v. Merriam* (1967) 66 Cal.2d 390, 397 (58 Cal.Rptr. 1, 426 P.2d 161)].)

Similarly, *People v. Luckett,* 1 Cal.App.3d 248, 253-254 sets forth:

> The unarticulated premise of this argument must be that even if a prior is not subject to collateral attack on a particular ground (*Johnson v. New*

Jersey, 384 U.S. 719 [16 L.Ed.2d 882, 86 S.Ct. 1772]; *In re Sterling*, 63 Cal.2d 486 [47 Cal. Rptr. 205, 407 P.2d 5]; *In re Lopez*, 62 Cal.2d 368 [42 Cal.Rptr. 188, 398 P.2d 380]; *Linkletter v. Walker*, 381 U.S. 618 [14 L.Ed.2d 601, 85 S.Ct. 1731]) the People may nevertheless not use it affirmatively to their advantage. This is an interesting problem which, however, is not before us. In *People v. Coffey*, 67 Cal.2d 204, 215-219 [60 Cal.Rptr. 457, 430 P.2d 15] the court, following its own lead in *People v. Merriam*, 66 Cal.2d 390, 397 [58 Cal.Rptr. 1, 456 P.2d 161], recognized that the defense had certain burdens in connection with raising the constitutional invalidity of prior convictions. *Coffey* was decided several months before the trial in the case at bar. At no time during the trial did the defense claim that the conviction as such was infirm because of a violation of defendant's *Miranda* rights. *Miranda* was relied on only to block admission of the statements defendant had made at the time of the 1962 arrest. If it had become a legitimate issue at the trial of this case where the 1962 conviction, as distinguished from the statements, was tainted, obviously a far more searching inquiry into the circumstances surrounding the guilty plea would have had to be made.

Moreover, it should be noted that *In re Tahl*, 1 Cal.3d 122, points out that it is only where counsel is present and because he is present that it has been considered proper to presume advisement of rights prior to the taking of a plea.

Examined in light of the above cases, the case presently before this Honorable Court is one in which the

Petitioner failed to sustain the incredibility light burden imposed upon him by the California procedure, to wit: the burden of affirmatively alleging a deprivation of constitutional rights—a burden imposed on a defendant who always appeared *with counsel.* As pointed out in the statement of facts Petitioner first moved to strike the prior on the ground that the record was silent as to waiver of his right to a jury trial, his right to be confronted by witnesses and his right to be free from self-incrimination. *He did not,* as he here contends *ever* state that he *in fact had not* voluntarily waived those rights. (See page 2 of Attachments to Petition). At a later time, after the first motion had been denied, on March 19, 1971, he denied the prior conviction "as untrue" and moved "the prior be found constitutionally invalid per *Boykin v. Alabama.*" This contention of "invalidity as a matter of law" rather than *because* he was deprived of a right was carried over into the Appeal to the Appellate Department of the Superior Court of Orange County via the Settled Statement of Facts prepared by Petitioner himself in which he set forth that "counsel for defendant moved the court to declare the 1969 conviction unconstitutional as a matter of law."

Petitioner, therefore, by its refusal to make a properly alleged motion never presented the California court with the issue it now seeks to raise before this Honorable Court since the California court never had the chance to determine whether a pre-*Boykin* record could properly be used as sufficient rebuttal of a claim that the defendant had never been advised of his rights and/or had never properly waived them.

II.

The California Procedure Is Constitutionally Proper.

The procedure set forth in the California Supreme Court cases cited above finds support in the recent opinions of this Honorable Court. In *McCarthy v. United States,* 89 S.Ct. 1166, 1172, 394 U.S. 468 this Honorable Court, in discussing cases where the record failed to show compliance with the mandatory requirements of Rule 11 of the Federal Rules of Criminal Procedure recognized that:

> The effect of that noncompliance (was) an issue that has engendered a sharp difference of opinion among the courts of appeals. In *Heiden v. United States,* 353 F.2d 53 (1965), the Court of Appeals for the Ninth Circuit held that when the district court does not comply fully with Rule 11 the defendant's guilty plea must be set aside and his case remanded for another hearing at which he may plead anew. Other courts of appeals, however, have consistently rejected this holding, either expressly or tacitly. Instead, they have adopted the approach urged by the Government, which is to place upon the Government the burden of demonstrating from the record of the Rule 11 hearing that the guilty plea was voluntarily entered with an understanding of the charge. See, *e.g., Halliday v. United States,* 380 F.2d 270 (C.A. 1st Cir. 1967); *Lane v. United States,* 373 F.2d 570 (C.A. 5th Cir. 1967). In these circuits, if voluntariness cannot be determined from the record, the case is remanded for an evidentiary hearing on that issue. See, *e.g., Kennedy v. United States,* 397 F.2d 16 (C.A. 6th Cir. 1968); *Halliday v. United States, supra.*

Prior to *McCarthy*, therefore, it was unquestionably proper to supplement lacunae in a record through an evidentiary hearing since in some of the cases mentioned by the court this Honorable Court had denied a petition for certiorari (See *McCarthy v. United States, supra,* at notes 22 and 23).

In *Halliday v. United States,* 89 S.Ct. 1498, 394 U.S. 831 the procedure of automatic remand for repleading without hearing set forth in *McCarthy, supra,* was held to have prospective application *only*. By implication, therefore, the *Halliday* holding reaffirms the fact that when the validity of a *pre-McCarthy* plea is involved the plea need not be found invalid as a matter of law merely because the record does not reflect the requirement of Rule 11.

McMann v. Richardson, 90 S.Ct. 1441; *Parker v. North Carolina,* 90 S.Ct. 1458; and *Brady v. United States,* 90 S.Ct. 1463 all reaffirm the long established rule that a *right* to a hearing on the merits does not arise until the defendant has made allegations which, *if true,* would invalidate the conviction. They thus support the California Supreme Court procedure which requires the defendant who wishes to invalidate a *prior conviction* to allege the violation of substantive constitutional rights which render it defective.

III.

The Requirements of Boykin v. Alabama Should Not Be Made to Apply Retroactively.

Respondent submits that the analysis of the California Supreme Court in *In re Tahl,* 1 Cal.3d 122, 134 is the best support for non-retroactivity of *Boykin.* The California Supreme Court in that case analogizes

Boykin with *McCarthy* and concludes that the non-retroactivity of *McCarthy* implies non-retroactivity of *Boykin*. The California Supreme Court further states:

> After pointing out that a defendant could attack an involuntary plea even in the absence of compliance with rule 11 by the trial court—as can a state defendant whose plea was accepted prior to *Boykin* (*cf. Johnson v. New Jersey* (1966) *supra*, 384 U.S. 719, 730 [16 L.Ed.2d 882, 890, 86 S.Ct. 1772])—the *Halliday* court explained what it obviously considered the most significant factors under the circumstances—reliance on the old rule and the effect on the administration of justice—as follows: "In *McCarthy* we noted that the practice we were requiring had been previously followed by only one Circuit; that over 85% of all convictions in the federal courts are obtained pursuant to guilty pleas; and that prior to Rule 11's recent amendment, not all district judges personally questioned defendants before accepting their guilty pleas. Thus, in view of the general application of Rule 11 in a manner inconsistent with our holding in *McCarthy*, and in view of the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11, we decline to apply *McCarthy* retroactively." (394 U.S. at p. 833 [23 L.Ed.2d at p. 20].)

The Court then goes on to show that to invalidate all such prior guilty pleas would have indeed "dolorous effect upon the administration of justice". At note 10 the Court states:

> The magnitude of the potential effect on the administration of justice is apparent when we note

> that in California for the years 1960 through 1967 felony convictions obtained on pleas of guilty totaled 173,496. (Crime and Delinquency in California (1967) p. 100.) The number of misdemeanor convictions would be considerably higher.

At note 11 the court makes a valid analogy in giving yet one more reason why *Boykin* should not be retroactively applied:

> A plea of guilty is in essence a confession in open court, and the procedures necessitated by the *Boykin* decision are analogous to those set out for in-custody interrogation in *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S.Ct. 1602, 10 A.L.R.3d 974.] In *Johnson v. New Jersey, supra,* the Supreme Court declined to apply *Miranda* retroactively, recognizing that confessions lacking *Miranda* warnings were not necessarily involuntary and that those warnings simply added "important new safeguards" against coerced confessions. Similarly, the absence of *Boykin* warnings does not necessarily negate the voluntary nature of a guilty plea, and the "important new safeguards" herein established may fairly be applied prospectively only.

Boykin and *Miranda,* Respondent submits, present many points of similarity. Both are procedural and both are intended to safeguard already existing constitutional rights. Both substantially affect a large segment of prior judgments. Both, it is submitted, should be treated in like manner and be non-retroactive in their application.

IV.

If Boykin Is Not Given Retroactive Application in Some Proceedings Such as Habeas Corpus Proceedings, Logic Requires It Not to Have Retroactive Application in Determining the Validity of Prior Convictions for Purposes of the Recidivist Statutes.

To give *Boykin* retroactive application for some purposes and not for others would obviously lead to a multiplicity of hearings and create havoc with the *res judicata* doctrine. By contrast if the *res judicata* is upheld and *Boykin* is made retroactive for purposes of the recidivist statutes only, the result would be to encourage crime.

The California Supreme Court has often time held that a defendant may attack the validity of a prior conviction on constitutional grounds even *after* the sentence has been served. In *Thomas v. Department of Motor Vehicles,* 3 Cal.3d 335, 337 for example, the California Supreme Court held:

> Ordinarily a judgment is presumed valid if collaterally attacked, unless it is void on its face. (*People v. Davis,* 143 Cal. 673, 675 [77 P. 651]; see 3 Witkin, Cal. Procedure (1954) Attack on Judgment in Trial Court, §§ 2-6, pp. 2044-2050.) However, a judgment of prior conviction, even though valid on its face, may be attacked at any time on constitutional grounds in a proceeding in which by reason of such prior conviction increased sanctions may be imposed against the person suffering it. (*Hasson v. Cozens,* 1 Cal. 3d 576, 579 (2) [83 Cal.Rptr. 161, 463 P.2d 385]; *People v. Coffey,* 67 Cal.2d 204, 214-215

[60 Cal.Rptr. 457, 430 P.2d 15].) Therefore, petitioner in the 1968 proceeding against him could have attacked the 1966 judgment, which served as a basis to increase the sanctions against him; and the municipal court's ruling on the issue in that proceeding would have been res judicata thereon. (*Hasson v. Cozens, supra,* 1 Cal.3d 576, 579-580 (2, 3).)

In light of the above rules of California procedure, should *Boykin* be made retroactive as to alleged priors and not as to *Habeas Corpus* proceedings, if a defendant convicted of a prior were to proceed by way of *Habeas Corpus,* the conviction contended invalid on procedural grounds would *not* be struck down. If he subsequently were to be accused of another violation in case of a violation of Vehicle Code Section 23102 (a), the ruling on *Habeas Corpus* would be *res judicata* and the prior allegation would be valid. On the other hand, if the defendant did not proceed by *Habeas Corpus* and he later were accused of a subsequent violation, he would be able to obtain a hearing on procedural grounds and *possibly* get his prior conviction set aside. The result would thus be that the *only* persons who could benefit from such a rule would be those who were accused of breaking the law a *second* time since they would be the only ones who could get the conviction set aside on procedural grounds. Clearly such a result would fly in the face of the very purpose of the so-called recidivist statutes. Conversely, this type of procedure would be to the disadvantage of a defendant who might prefer not to petition for writ of *Habeas Corpus* if, by so doing, he were to preclude an easier determination of validity at a later time if and when he were to be convicted again.

That the validity of prior convictions should be, if anything, less carefully scrutinized when the prior conviction merely augments the penalty for a subsequent crime is best set forth in the concurring opinion of Chief Justice Warren in *Spencer v. Texas,* 385 U.S. 554, 17 L.Ed.2d 606 wherein the then Chief Justice analyzed case No. 70 as follows:

> No. 70, however, raises the question of whether a decision that the old Texas procedure violates due process should be retroactively applied to convictions which are final but which are collaterally attacked in the federal courts by habeas corpus. Connsiderations of fundamental fairness have led to the opening of final judgments in criminal cases when it has appeared that a conviction was achieved in violation of basic constitutional standards. Thus, in the decisions which have been applied retroactively, *Gideon v. Wainwright,* 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792, 93 A.L.R. 2d. 733 (1963); *Douglas v. California,* 372 U.S. 353, 9 L.ed.2d 811, 83 S.Ct. 814 (1963); *Griffin v. Illinois,* 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585, 55 A.L.R.2d 1055 (1956); and *Jackson v. Denno,* 378 U.S. 368, 12 L.ed. 2d 908, 84 S.Ct. 1774, 1 A.L.R.3d 1205 (1964), the Court concluded that the constitutional error perceived undermined "the very integrity of the fact-finding process," *Linkletter v. Walker,* 381 U.S. 618, 639, 14 L.ed. 2d 601, 614, 85 S.Ct. 1731 (1965) and the fundamental fairness of the resulting conviction. On the other hand, our decisions in *Linkletter and Tehan v. Shott,* 382 U.S. 406, 15 L.ed. 2d 453, 86 S.Ct. 459 (1966), demonstrate that practices found to violate the

> Due Process Clause of the Fourteenth Amendment need not necessarily be applied to final convictions. The factors adverted to in those cases for determining whether a constitutional decision should be applied to final cases were the State's reliance on the conduct newly found unconstitutional, whether the purpose of the new rule would be served by fully retroactive effect, and the effect of retroactivity on the administration of justice.

Interestingly prior to making the above statement the Chief Justice had set forth his ideal system of procedure concerning the allegations and use of priors. Later in the decision he points out that the California procedure has:

> substantially mitigated the prejudice of the single-stage recidivist procedure by affording the defendant the right to stipulate to his prior crimes to prevent their introduction at the trial.

After pointing out that in all cases where the constitutional doctrine had been retroactively applied the procedure had gone "to the heart" of the fairness of the conviction, the Chief Justice concluded:

> In contrast to the unconstitutional procedures involved in the cases discussed above, the admission of prior-convictions evidence in connection with a recidivist statute does not seem to me to justify reversal of final convictions. The fact that prior-convictions evidence has been traditionally admitted when related to guilt or innocence suggests that its prejudice has not been thought so great as to undermine "the very integrity of the fact-finding process" and to involve a "clear danger

> of convicting the innocent." See *Linkletter v. Walker,* 381 U.S. 618 at 639, 14 L.ed2d 601 at 614; *Tehan v. Shott,* 382 U.S. 406 at 416, 15 L.ed.2d 453 at 459. Consequently, I would not apply a decision in line with this dissent to final convictions, such as No. 70, a habeas corpus proceeding.

Burgett v. Texas, 88 S.Ct. 258, 389 U.S. 114 is not here in point. That case was based on the fact that:

> During the course of the trial, while the jury was present, the State offered into evidence a certified copy of one of the Tennessee convictions. The conviction read in part, "Came the Assistant Attorney-General for the State and the Defendant in proper person and without Counsel." Petitioner's counsel objected to the introduction of the record on the ground that the judgment on its face showed that petitioner was not represented by counsel in violation of the Fourteenth Amendment.

The *Burgett* court properly concluded that the record on *its* face showed a positive denial of the right to counsel. The ruling was also based on the predetermined retroactivity of *Gideon v. Wainwright,* 372 U.S. 335. It does not, as Petitioner contends stand for the proposition that the same result must follow where as here the Petitioner alleges no violation of rights except that the record does not reflect advisement; where as here all that the Supreme Court has done is deny *a presumption* of validity (for *Boykin* cannot be contended to go as far as *McCarthy* although so interpreted by the California Supreme Court); and, finally, where as here *all* that the prior conviction does is enhance the penalty, and is not an element of the crime (*Cf. People v. Hudgins,* 59 Cal.App.2d 175). Re-

spondent thus urges this Honorable Court to reaffirm the principles of *Carnley v. Cochran,* 369 U.S. 506 as interpreted by the California Supreme Court in *In re Woods, supra,* wherein the California Supreme Court stated:

> In the course of that decision the court uttered its well-known language to the effect that waiver will not be presumed from a silent record (*Carnley v. Cochran, supra,* 369 U.S. 506, 516), but it clearly did not hold that non-waiver will be presumed from a silent record. Thus, the clear position of the highest court is that the determination of waiver is not to be based wholly on the strict record of proceedings below, though a party who does not raise the fact issue by proper allegations may be bound by that record.

In light of all the above reasons and for the additional reason that the retroactive application of *Boykin* in determining the validity of prior convictions would require the retrial of an estimated one-third of the convictions obtained since *Boykin* (approximately 5000[1] cases in Orange County alone), Respondent respectfully urges this Honorable Court to deny the Petition.

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[1]This figure was arrived at by checking the files of the District Attorney's Office for the number of convictions either by trial and/or by guilty plea obtained since *Boykin* in both misdemeanors or felonies. By sampling the complaints and Indictments, one-third of all cases filed appear to allege priors. These statistics are thus a mere approximation and in no way are they to be interpreted as representing an actual and exact figure.

Dated this 30th day of November, 1971.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-375

VERL EDWARD THAYER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONER'S REPLY BRIEF.

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Preliminary Statement.

This brief is filed under authority of Supreme Court Rule 24(4), which permits Petitioner to respond to arguments raised for the first time in Respondent's brief in opposition to a petition for a writ of certiorari.

Question Presented.

WERE THE CONSTITUTIONAL ISSUES ON WHICH PETITIONER SEEKS REVIEW PROPERLY RAISED IN THE CALIFORNIA COURTS?

ARGUMENT.

Respondent argues that Petitioner failed to raise the issues in the California courts on which he now seeks review. It is respectfully submitted that the record on file with this honorable court clearly disproves such allegations.

The record shows that on January 5, 1971, defendant moved the trial court to declare the prior conviction unconstitutional in that the record of that proceeding did not show waivers of jury trial, confrontation of witnesses and privileges against self-incrimination.

Again, the record indicates that on March 19, 1971, defendant denied the prior as untrue and moved the court to invalidate the prior per *Boykin v. Alabama.*

The record also reveals that a certified copy of the silent record of the prior conviction was before the trial court.

Finally, it is apparent from the record that the People did not at any time allege that despite the silent record supporting the prior conviction Petitioner was in fact advised of his rights and did in fact waive them. Nor was any evidence offered in support of such an allegation.

Boykin v. Alabama, 89 S. Ct. 1709 (1969) 395 U.S. 109, dealt factually with a defendant whose conviction rested on his own plea of guilty. At the time the plea was accepted by the court, Defendant Boykin was represented by court-appointed counsel. The record was silent as to whether the trial court advised Boykin of the constitutional rights surrendered by pleading guilty and whether or not he voluntarily waived these rights.

Following sentencing, an appeal was taken by defendant Boykin, first in the Alabama state courts and ultimately before the Supreme Court of the United States. *At no time* did Boykin allege that he had not in fact been advised by the trial court of the rights he surrendered by pleading guilty.

In reversing Boykin's conviction, the Supreme Court of the United States held there was reversible error ". . . because *the record* does not disclose that the defendant voluntarily and understandingly entered his plea of guilty. . . ." (Emphasis added.)

To justify its decision, the Supreme Court pointed out that in the case of *Carnley v. Cochran,* 369 U.S. 506, 516, 82 S.Ct. 884, 890, it was held that waiver of the right to counsel could not be presumed from a silent record and that *the record must show, or there must be an allegation and evidence which shows,* the accused was offered counsel but intelligently and understandingly rejected the offer. The court then said:

> ". . . We think that the same standard must be applied to determining whether a guilty plea is voluntarily made. . . ."

In a later part of its opinion, the court also stated:

> ". . . The question of an effective waiver of federal constitutional right in a proceeding is of course governed by federal standards. . . ."

It would appear unquestionable, therefore, that the Supreme Court of the United States held in *Boykin v. Alabama* that when a conviction resting on a plea of guilty is reviewed no waiver will be presumed from a silent record. The *burden is on the People to allege that there was advisement and waiver and they must offer evidence in support of such allegations.* If the People fail to make the required allegations and offer supporting evidence, then the presumption of non-advisement and waiver which attaches to a silent record will control and the conviction cannot be upheld.

In the instant case, the failure by the People to make the necessary allegations and offer evidence in support thereof is the precise issue on which Petitioner now seeks review. The trial court held that such allegations and evidence by the People were not required because the guilty plea was entered prior to the date of the *Boykin* decision. Petitioner Thayer believes he is entitled to the benefit of the *Boykin* holding because it was the law of the land on the day his prior conviction was offered to enhance sentence in a new and unrelated judicial proceeding.

Respondent's copious quotations from unrelated or superseded pre-Boykin case law indicate either (1) a misinterpretation of the holding of *Boykin v. Alabama* or (2) misapprehension of the issues appealed and on which Petitioner now seeks review.

These issues were thoroughly, carefully and meticulously raised by Petitioner in the California courts. Respondent's argument that they were not must surely be nominated frivolous and overruled.

Respectfully submitted,

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Attorneys for Petitioner.